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Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Comments received from Member States and international organizations

Note by the Secretariat*

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* The late submission of the document reflects the date on which the proposals were received by the Secretariat.

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II. Comments received from Member States and international organizations

A. Member States

Austria

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[6 April 2006]

Comments on draft legislative provisions on interim measures and on the form requirement for arbitration agreements

The Austrian Ministry of Justice thanks UNCITRAL for giving it the opportunity to comment on the draft text which was so meritoriously developed by the Secretariat taking into consideration the discussion of Working Group II at its forty-fourth session in New York. As requested by the Secretary-General our comment will be straight to the point and very concise.

In general Austria can go along with the draft text as it currently stands and avails itself of this opportunity to congratulate the secretariat for its excellent work in the course of and in between the Working Group meetings related to this topic.

There are, however, two elements in the draft text Austria is not really content with:

First, Austria would like to reiterate its position that it is neither desirable nor appropriate to confer on arbitral tribunals the power to grant preliminary orders on an ex parte basis. The party against which an interim measure is invoked should always be given the possibility to present its position prior to the issuance of such a measure.

Therefore, Austria remains critical of draft article 17 ter of the Model Law even taking into account the specific precautions set out by article 17 quater, in particular paragraph 5 of this article. The opt-out solution in article 17 ter (1) seems to be not sufficient to protect the rights of the parties. As a rule parties to an arbitration agreement might not be aware of the danger of being later faced by a preliminary order directed against them and might therefore not be prepared to opt-out via a respective clause in their arbitration agreement.

Secondly, as Austria already pointed out during the meetings of the Working Group, this delegation is highly sceptical as to the exposure of the form requirement laid down in article 7 of the Model Law and therefore strongly opposed to the idea that an arbitration agreement could validly be concluded orally or even by mere conduct of the persons involved. Austria proposes to stick to the current wording of article 7 of the Model Law as neither of the two variants for a revised article 7 is able to meet our concerns and there is, in our view, no urgent need for abandoning the current requirements laid down in article 7 as it currently stands.